87-1964

No. _____

IN THE SUPREME COURT
OF THE
UNITED STATES
October Term, 1987

MITCHELL MELNICK

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM GENERAL INSURANCE COMPANY

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW MEXICO

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QUESTIONS PRESENTED FOR REVIEW

Does the Opinion of the SUPREME COURT of New Mexico herein violate the Constitution of the United States and the Constitution of the State of New Mexico, for which the United States Constitution gives protection, in this Independent Contractors Insurance Agent's Case of the Petitioner herein by withholding from its Opinion an under Oath decision in this Case, by the President of STATE FARM, contra to the Opinion, and prior to the Opinion, whereby the SUPREME COURT of New Mexico Opinion assumed control of the highest corporate authority, solely delegated to the President by the Board of Directors of STATE FARM, thereby completely nullifying a lawful Corporate Decision and substituting an unconstitutional State Decision, which State Decision was solely based on this substitution and which impaired Petitioner Agent's contract with STATE FARM which is the universal contract of STATE FARM with its Agents Nationwide, and thereby directly impaired Petitioner's contract with the Company, thus destroying a fundamental Constitutional Right?

[The President testified pursuant to authority from the Board of Directors of STATE FARM giving him sole authority to terminate Petitioner, that this Agent could not be terminated "at will". The Opinion is directly contra.]

Is due process as provided by the Constitution of the United States, 14th Amendment violated when the SUPREME COURT rendered the above Opinion without having the sole point on which the Opinion was based as an Appellant point for review?

Did the SUPREME COURT of New Mexico act in violation of the New Mexico Constitution by acting as a Court of original jurisdiction in deciding a point not before it in a Case which was on Appeal? Did this violate the New Mexico Constitutional right of the Petitioner to at least one appeal and is relief afforded for this unconstitutional act through the 14th Amendment, U.S. Constitution?

Is a violation of New Mexico's Rules Governing the Practice of Law whereby "A lawyer shall abide by a client's decisions concerning the objectives of representation. . . ." applied to the Justices of the SUPREME COURT who

have knowledge of the President's decision, supra, and were given an opportunity to correct their Opinion?

Does the 14th Amendment entitle Petitioner to a "due process" termination hearing for loss of "liberty" and "property" rights and does the New Mexico SUPREME COURT qualify as the State body which terminated Petitioner by its Opinion, App. 23. which is the initial and only "termination at will" and which by its dismissal ended Petitioner's "bad faith" Case in the "for cause" Trial? App. 25, 26.

AND/OR Is Petitioner entitled to a due process hearing by the 14th Amend. because he is so controlled, supervised, and licensed by the Corporation Commission of New Mexico by its INSURANCE CODE for the protection of the general public and does said "Code" render unconstitutional the Opinion of the SUPREME COURT as being a usurpation of the "Executive" and "Legislative" Constitutional functions, protected by the 14th Amend. since the State SUPREME COURT has made the unconstitutional transfer of powers to itself?

Do the people of New Mexico, including

Petitioner, suffer a loss of their recognized "Right of self-government" and "Inherent rights", Const. of New Mexico, Art. II, Sec. 3, 4, as provided by their Constitution when their SUPREME COURT reduces Petitioner to the status of a worker subject to termination "at will", thereby justifying the appropriation of his Insurance Agency and depriving him of any remedy by dismissing his Case when neither the Petitioner or the sole Defendants, STATE FARM acting through its highest authority, had not requested the SUPREME COURT to do so? Is this a multiple violation of the 14th Amendment?

Is the Opinion effecting an "at-will" termination, a loss of freedom in this Case and a dangerous totalitarian precedent for the future, that brings into operation a guarantee by the United States of America that "every State in this Union" have a "Republican form of Government"? Art. 4, Sec. 4, U.S. Constitution.

Is the Opinion Judicial authorization for Corporate Revolt whereby the lawful authority of the President is destroyed by the action of STATE FARM's Trial

and House Counsel suggesting termination "at will" under a false heading in its ANSWER BRIEF, App. 51, 61, 62, which Brief withheld Trial testimony in the Transcript by PRES. RUST to the contrary, i.e., a violation of Professional Ethics that the Client, not the Attorney, makes the decisions and other rules for the Practice of Law. (Sec. "f").

Considering this Nationwide Agents contract and its use by Clients of the Agents' carrying their policies State-to-State for execution and interpretation everywhere, so urge one interpretation that the Opinion by a single State contrary to the home office of the Company, constitutes an unconstitutional "burden" on Interstate Commerce and impairs the obligation of contract.

(d) The Opinion by the New Mexico SUPREME COURT is not yet reported in the Official or Unofficial Reports, except as published in the New Mexico State Bar Bulletin, Vol. 27, No. 10, dated March 10, 1988 at Page 157. The Opinion is set out in Appendix herein, Page 1, et seq.

(e) Opinion by the New Mexico SUPREME COURT was dated and filed February 2,

1988. On February 26, 1988, the SUPREME COURT entered an ORDER denying Petitioner's "Motion for Reconsideration" which had been filed February 17, 1988. On February 26, 1988, the SUPREME COURT filed its Mandate. All the above appear in the Appendix.

Jurisdiction is conferred by 28 USC § 1257 (3).

The Caption the Case in this Court contains the names of all parties.

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Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Art. 4 § 4 **U. S. CONSTITUTION**

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; . . . .

Art. IV. § 8 **U. S. CONSTITUTION**

The Congress shall have power . . . . to regulate Commerce . . . . and among the several states.

Art. I, Sec. 10 **U.S. CONSTITUTION**

No State shall . . . . pass any Bill of Attainder, Ex Post Facto Law or Law impairing the obligation of Contracts.

Art. VI. § 2 **CONSTITUTION OF NEW MEXICO**

Sec. 2 [Supreme Court; appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or imprisonment shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction as may be provided by law provided that an aggrieved party shall have an absolute right to one appeal. (As amended September 28, 1965). NMSA Vol. 1, 1978.

Art. VI § 3

Sec. 3 [Supreme court; original jurisdiction; supervisory control; extraordinary writs.]

The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions, and shall have a superintending control over all inferior courts; it shall also have power to issue writs of mandamus, error, prohibition, habeas corpus, certiorari, injunction and all other writs necessary or proper for the complete exercise of its jurisdiction and to hear and determine the same. NMSA Vol. 1, 1978.

Art. II § 18 NEW MEXICO BILL OF RIGHTS
Sec. 18. [Due process; equal protection; sex discrimination.] NMSA 1978, Vol. 1

No persons shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. NMSA, Vol. 1

RULES GOVERNING THE PRACTICE OF LAW
STATE OF NEW MEXICO
NMSA, 1978, Jud. Vol. 2

A. Client's decisions. A lawyer

shall abide by a client's decisions concerning the objectives of representation, subject to Paragraphs C, D and E, and shall consult with the client as a means . . . . A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. NMSA

16-104. Communication.

B. **Client's informed decision-making.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Art. II, § 3 CONSTITUTION OF NEW MEXICO

Sec. 3. [Right of self-government.]

The people of the state have the sole and exclusive right to govern themselves as a free, sovereign and independent state.

Sec. 4. [Inherent rights.]

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

NMSA VOL. 9, CHAPTER 59A

(All the following Codes are listed under Insurance Code)

ARTICLE I.

59A-1-5. "Insurance".

"Insurance" is a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies, or to act as surety.

59A-1-14. Compliance required.

No person shall transact a business of insurance in New Mexico, or relative to a subject of insurance resident, located or to be performed in New Mexico or elsewhere, without complying with the applicable provisions of the Insurance Code.

59A-5-7. "Mutual" insurer defined.

A "mutual" insurer is an incorporated insurer without capital stock, the governing body of which is elected by its policyholders. (Further insurance code provisions are in App. - et. seq.

STATEMENT OF THE CASE

"g"

THE MOST CENTRAL FACT

PRES. RUST for STATE FARM, the Defendant in a wrongful termination Suit by a STATE FARM Agent, MELNICK, who was a LIFETIME MEMBER of THE PRESIDENT'S CLUB, testified under Oath in his Deposition in this Case, and which was in the transcript upon Appeal, having been read at the Trial, that Agent MELNICK could not be terminated "at will" because he was a LIFETIME MEMBER of his PRESIDENT'S CLUB and that is what LIFETIME means, Deposition Page 131. PRES. RUST had sole authority from the Board of Directors to terminate an Agent. RUST'S Deposition words are Q. "What do you mean the meaning of Life is as used there? When STATE FARM says you are a LIFE MEMBER?" A. "Well that means he is in the club." Q. "Do you think that is inconsistent with termination"? A. "No, I have had to terminate several life members and regret it very much". Q. "Would have to be for serious cause?" A. "Yes." Q. "and you would agree that if lifetime - if he is in the club - couldn't go around and say now we

have changed our mind and putting you out for no cause." A. "That's right." PRES. RUST said referring to AGENT MELNICK "He was a life member". Page 131 of MR. RUST'S Deposition, App. 72, 33, 34, which was in the Transcript, but not relevant to the APPEAL since only the lack of evidence of "bad faith" by STATE FARM was an Appeal Point and there was no Cross-Appeal, and therefore none of the Briefs contained any reference to PRES. RUST's testimony which established Company Policy saying that this Petitioner could not be terminated "at will". The SUPREME COURT Opinion denied the reasons given for a "directed verdict" given below which would have sent the Case back for a new Trial on the sole Appeal Point, viz, namely "bad faith" in a "cause" termination, however, the Opinion substitutes its own reason and used the "DIRECTED VERDICT" below as the format, but substituted its own reason, App. 25, 26, which was that Agent MELNICK was terminated without cause because his independent contractor relationship with STATE FARM was "at will" and "cause" was not necessary. The words of the Court are "He was an

independent contractor under the Agreement, the Agreement was for an indefinite period, and it was therefore terminable "at will". Page 10 of the Op., App. 25, 26. PRES. RUST's testimony, which the Opinion directly contradicted, was omitted entirely from the Opinion and does not appear in any of the Briefs and thereby is made applicable to the contract between STATE FARM and Petitioner making it a final determination of the Agency Contract which is in use by STATE FARM and its Agents throughout the country. Therefore the CONTRADICTION of the President and the OMISSION and the failure to make any reference to PRES. RUST's testimony are the combination which this Petition addresses. Petitioner presented the CONTRADICTION in a "Motion for Reconsideration", App. 30, and specifically mentioned the OMISSION of PRES. RUST's testimony from the Opinion. App. 34. This Motion was denied without comment, App. 65, thereby dispelling any possibility of an inadvertent OMISSION. The "Motion for Reconsideration", App. 30, contains many facts explaining the above. There were and are no changes in STATE FARM policies.

THE SUGGESTION BY STATE FARM'S COUNSEL IN ANSWER BRIEF

STATE FARM'S ANSWER BRIEF shows that it is structured solely to answer Appellant's two (2) points. We point to Number II.B. P. 22 of ANSWER BRIEF which says "AN IMPLIED COVENANT OF GCOD FAITH DOES NOT GIVE MELNICK A CLAIM FOR RELIEF IN THIS CASE". Although purporting to be as to its main heading only an argument in favor of no evidence below Re: the Trial Court's DIRECTED VERDICT, it suggests to the SUPREME COURT the path taken by the Opinion, but fails to make any reference to its own Client's under Oath testimony which was before the SUPREME COURT of New Mexico (Transcript). Ethical questions involving assumption of the powers of the Client by Attorneys are raised. See "f". Defense Counsel raised the "at will" argument on several occasions before Court before Trial and it had always been denied. The Corporate setup of STATE FARM MUTUAL, empowered the Board of Directors to safeguard termination. The Board gave final authority to the President.

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The Federal questions sought to be reviewed were first raised in the New Mexico SUPREME COURT through Petitioner's, Appellant, "Motion for Reconsideration" filed February 17, 1988 wherein he asked the SUPREME COURT to reconsider its opinion filed February 2, 1988 which held against him as Appellant. The Opinion and "Motion" are in App. 1-29, 30-40. The "Motion for Reconsideration" was denied without comment on February 26, 1988. App. 65. The Appeal was only to the question of adequate evidence of bad faith by the Defendant, STATE FARM. Federal questions arise in the Opinion, because the New Mexico SUPREME COURT overturned the Court below on its directed verdict for lack of evidence of bad faith, however, the SUPREME COURT affirmed a directed verdict below, but entirely different from the Trial Court and entirely apart from the Appellant's points for Appeal. Therefore, Petitioners Motion for Reconsideration was the first opportunity to object to the Opinion and the Federal questions resulting therefrom. App. Supra.

ARGUMENT

THE OPINION IS A GOVERNMENTAL TAKEOVER OF PRIVATE ENTERPRISE

The Constitutional violations are aggravated by ethical violations and the result is a disruption of the fundamentals of our country's private enterprise system. Said interference is totalitarian. Ethical violations are intertwined. There is misuse of the entire judicial system, since Ethics insert a spirit as professional standards adopted to aid Justice. Our Constitution guarantees a Republican form of Government. U.S. CONSTITUTION, Article IV, Section 4. In this case a private enterprise decision which affects thousands of Agents and the business of STATE FARM throughout the Nation was made in Santa Fe, New Mexico, by a governmental body and not in Bloomington, Illinois, where the Deposition of PRES. RUST was taken in 1984. Our form of government cannot exist with such substitution of authority. Silence on critical issues and the monopolistic Reporter System for decisions disputes the truth of the case. The substitution of Court

for the President's decision making power is not disclosed by the Opinion. When we put judicial "omission" and "due process" together it does show a wrong, but the true label comes from the ethical violations with the resultant destruction of the whole system as Justice. What is to prevent its repetition there or anywhere else? "Due process" does not in this instance pinpoint the precise wrong and is so widely used as to have lost some of its deterrent effect. STATE FARM did not ask for this decision and in fact the President expressly rejected it. The suggestion came only from STATE FARM's Attorneys, both Trial Counsel and House Counsel. This suggestion contained in the Answer Brief was disguised as an Answer to the only points on Appeal, namely the sufficiency of evidence on bad faith. This indicates the ethical violations prohibited by New Mexico's Rules Governing the Practice of Law, and in particular, Section 16-102. See "f". Although the Opinion favors STATE FARM in this particular case, it works havoc upon its control of its own corporation. The danger to private individuals like

Agent MELNICK is even greater in the loss of right to contract freely. If an Agent can be terminated "at will", he is at the Company's mercy. The Agent is the personal contact with the insureds. Their bargaining position with the Company is through their Agent. It is apparent what terminating "at will" means to these negotiations.

Reference is made to Kraszewski et al v. State Farm, (D.C. for N.D. of Calif. reported in 35 EPD 219) now a final decree holding STATE FARM in wrongful discrimination against women in the selection of their Agents. In our case, STATE FARM wants the law of absolute termination of Agents, otherwise they would have not endorsed their own Attorneys' actions in their ANSWER BRIEF supporting "at will" power for the Company. The California victory for Agents is minimized if after Agents are selected without discrimination, they can be fired "at will". Ethics are not simply administrative rules and are truly of the nature of constitutional provisions that impose limitations upon those functioning within a system which is obscure to outsiders. Ethics,

even though adopted by the profession, are for the benefit of the parties. The Opinion does not state truthfully the question when it knew what the question was, or at least had an inescapable opportunity to know the question through a "Motion for Reconsideration". App.30. The Opinion violates the Constitution of New Mexico, Art. 2, Section 3, Art. 2, Section 4, Section "f", which provides that they have the right of "acquiring, possessing and protecting property". MELNICK and STATE FARM have the right to protect the property right of contract and the property right of operating a business by their own decisions. The SUPREME COURT's interference is a violation of New Mexico's Constitution as outlined above which is protected by the U.S. Constitution under the 14th Amendment since the method used by the SUPREME COURT constituted a rejection of the Constitutional form of Government adopted by the people of the State of New Mexico which the United States guaranteed to that State under Art. 4, Sec. 4 of the U.S. Constitution. The method by which the deprivation of constitutional rights took place

was the omission of the lawful authority conferred by the Board of Directors who were selected by democratic vote by the Stockholders of the Mutual Company, upon the President. The omission was intentional.

STATE FARM'S TRIAL AND HOUSE COUNSEL

An examination of the New Mexico Rules mandates the disclosure of legal authorities unfavorable to the Attorney's contention. 16-102 (See "f"). The nondisclosure of pertinent facts, especially in the manner in which it was done in the ANSWER BRIEF App. 53 , raises even more serious questions of lack of responsibility. 16-304, 16-804, Rules of Professional Conduct, See "f". Counsel thereby cooperated in the Opinions "omission". The precedent thus established can now go forward as being authorized unless countermanded.

AFFECT UPON FUTURE LITIGATION

As stated in Appellants Motion for Consideration, Page 6, App. 37. "The effect of such a procedure on attorneys and trial judges is destructive. App.37.

Reference is made to Page 4 of "Motion for Reconsideration" for further facts including a reference to the "Canons of Ethics" which "absolutely places the control of litigation on the Client, unless the Client wants something illegal to be done". As pointed out on Page 4 overturning a PRES. RUST decision, makes him out to be a fraud in the eyes of all Agents by revoking his decision on Agent MELNICK. All contracts with Agents are thereby threatened and the credibility of the spoken word is impaired causing insecurity in all STATE FARM internal transactions.

There are other antisocial rulings in the Opinion, e.g., STATE FARM could engage in numerous bad faith practices towards their Agents, carry on an investigation by the company for the purpose of terminating for cause and set up a court to hear the cause and engage in a one-sided oppressive hearing, and then, in a State Court Trial on the issues come forward in the SUPREME COURT of New Mexico and say it was all innocuous because we are exercising the right of termination "at will". The power of the SUPREME COURT to make RULES for

Appeals does not include the power to disregard them.

INTERSTATE COMMERCE IS BURDENED CONTRACTS AND EXPO FACTO LAWS U.S. CONSTITUTION ARTICLE 1, SECTION 10

Nothing is more Interstate Commerce than Motor Vehicle traffic. Petitioner submits that the Opinion considering its Nationwide effects is an unconstitutional burden. PRES. RUST decision barring termination "at will" applies to all Agents everywhere. STATE FARM Agent's Contract is the same throughout the country. Agents are the contracting party with the public in all of the States. Consequently, anything that substantially affects the Agent's relationship with the home office can have an effect upon the policyholders. The point in this Interstate Commerce burden problem is one of contract interpretation. The Opinion has opened the door for 50 interpretations for a contract which is itself a type of labor negotiation within the Company with Nationwide applications, e.g., the numerous situations of drivers having accidents or problems of any kind when they are away from

their residence, and their own Agents. There is a struggling STATE FARM's Agent's voluntary Association. The chaotic effect of New Mexico making the Insurance Agency contract different from what the President did casts a burden upon Interstate Commerce, and therefore we submit it is unconstitutional. This viewpoint is enhanced by a State of New Mexico public policy which places the supervision of the Insurance Company and the Agents under the Corporation Commission. See App. 70 . This makes the SUPREME COURT's action a usurpation of an executive function created by the Legislature. State Constitutional violations in the separation of powers are also protected by the U.S. Constitution possibly under the "due process" clause which would assist Agent MELNICK in this Case and also under Art. 4, Sec. 4, since an interference with a State Constitutions separation of powers is a rejection of the Republican form of Government guaranteed to every state by the Constitution. If the guarantee is to be given its literal meaning, it would seem to require correction. Petitioner adds to the above the problem

created by the Reporter System which carrys into all Courts, Law Schools, Lawyer's Offices, Libraries, and in this instance, into all STATE FARM Agent's Offices by word of mouth. STATE FARM Agent's and probably their thousands of insureds, would conclude that the Opinion was applicable to any lifetime member. National momentum is built up for an interpretation of Agent's contracts everywhere. Opinions are accepted as statements of the Truth, both as to Law and Facts. When facts are omitted, the legal conclusions are artificial. Credibility is lacking. Considering the Interstate nature of the Transportation Industry and the Agent's role re the contact between the users of the vehicles and the Insurance Companies, certainly Commerce between the States is affected by the interpretation of the contracts and hinders "Interstate Commerce" in violation of Art. I, Sec. 10, NLRB v. Jones and Laughlin Steel Co., 301 US 1 55 S.Ct. 615 81 Led. 893 (1937), Bibb v. Navajo Freight Lines, 79 S.Ct. 962, 359 US 520 3 Led.2 1003 (1959). PRES. RUST and Agent agreed that he could not be terminated "at will". The facts

in this case clearly show that the President's interpretation destined for Nationwide acceptance will be disregarded by Company Attorneys. The Board of Directors of STATE FARM realized that the Agents were the producers of all their income and needed protection. There is a real partnership intended in the STATE FARM Organization, but that has been disregarded and the status of the Agents drastically denigrated by the Opinion which also is an impairment of contracts by the SUPREME COURT of New Mexico, U.S. Constitution, Art. 1, Sec. 10, which prohibits a State from passing a law impairing the obligation of contracts. If the State Legislature is thus prohibited, certainly a State SUPREME COURT could not do so and the 14th Amendment would specifically bar the Opinion. The impairment consists in an interference in the Agent's contract as agreed upon by the President and all Agents who are lifetime members of this club. It is also under the 14th Amendment in Expo Facto Law and Judicial Legislature since the matter of "at will" termination was not up for Judicial determination in the New

Mexico SUPREME COURT, through its Appellate processes which leads to a further constitutional violation in that the SUPREME COURT of New Mexico exercised original jurisdiction when they had only Appellate Jurisdiction according to the Constitution, Art. VI, Sec. 2 and 3, Ammeran v. Hubbard Broadcasting, Inc., 89 NM 307 551 P2d 1354 (1976).

AGENT MELNICK's LOSS OF PROPERTY RIGHT AND LIBERTY RIGHT UNDER THE 14TH AMENDMENT

This is a distinct argument, but related to our other due process contentions such as the SUPREME COURT saying "termination at will", when that issue was not on Appeal. App. 64. Reference is made to numerous recent cases, where the 14th Amendment has required a due process Notice and Hearing on certain kinds of termination and certain persons terminated. Perry v. Sanderman, 408 US. 593, 33 Led. 2 570, 92 S.Ct. 2694; Board of Regents v. Roth, 408 US 564, 92 S.Ct. 2701, 33 Led. 2 548; Beckham v. Harris, 756 Fed. Rptr. 2p. 1032, [1985], and many others explain the applications and limitations such as

"liberty" as well as "property" loss. Petitioner suffered a loss of both as shown in the trial below, including the loss of his State of New Mexico License as an Insurance Agent for STATE FARM. Petitioner was not presented with "termination at will" until the New Mexico SUPREME COURT Opinion. That Opinion ends the case and bars a new trial as to whether STATE FARM was guilty of "bad faith" in the "termination" hearing. The SUPREME COURT obviously qualifies under the clause "No State". 14th Amendment. The Opinion is retroactive and is the actual act of Termination by the exercise of Judicial Authority. It rendered as useless the decision of termination made by the Review Board from which this Case for "bad faith" arose. The cases cited above are in the general category of Petitioner's Lawsuit for bad faith but are against an employer who could qualify as "State". SUPREME COURT of New Mexico was clearly a "State organ" exercising the Termination without giving the Petitioner a hearing and going further by barring him from having a legitimate "due process" hearing by dismissing his case. We submit that

the 14th Amendment has been violated by the State of New Mexico. Beckham v. Harris, supra, says page 1036, "in order to be entitled to the procedural safeguards encompassed be the due process clause of the Fourteenth Amendment [notice and an opportunity to be heard]. The complaining party must suffer from deprivation of "liberty" or "property" interest". The practical result is that the SUPREME COURT did not give the Petitioner, Appellant below, "notice" and an "opportunity to be heard", thus violating his Constitutional rights. Since it alone caused a "termination at will" and dismissed a "bad faith" hearing, their Opinion is properly before this Court for Relief. Beckham v. Harris, supra, also says in regard to the qualifications for a legitimate claim "the sufficiency of such a legitimate claim of entitlement must be decided by reference to State Law, Bishop v. Wood, 426 U.S. 341, 344 96 S.Ct. 2074, 2077, 48 Lawyers Ed. 2nd, 684 as evidenced by State Statutes, Local Ordinances, Rules are mutually explicit understandings that support the claim". We submit that the New Mexico SUPREME COURT Opinion

is the State Law making this claim "legitimate".

"AT WILL" vel non IS ISSUABLE

If the employment is strictly "at will", the 14th Amendment is not available. However, whether it is strictly "at will" has been contested often. Marin Piazza v. Aponte Roque, 668 F.Supp. 63 (D.Puerto Rico 1987); Romano v. Harrington, E.D.N.Y. 1987, 664 F.Supp. 675. The Opinion therefore not only made a determination of Law, but also a factual determination as a basis for it which was totally at variance with the actual facts. MITCHELL MELNICK should have the right to a new trial.

The foregoing Argument is predicated upon the SUPREME COURT of New Mexico exercising "STATE Action".

STATE CONTROL OF INSURANCE BUSINESS

Appellant has cited provisions in the Insurance Code showing State control over Insurance Agents in the Insurance Industry. See "f" and App. 70, et seq. Mandatory Liability Insurance is now required in New Mexico and in many States. The Insurance Agent is the immediate

contracting party charged with the enforcement of the Insurance Laws. His Company is also charged with a like responsibility. So close to the State Insurance Agency are both, we submit that termination by the Company, doing Business on a National scale, would qualify an Insurance Agent for the protection of the 14th Amendment as stated in Beckham, supra. If so, Petitioner would be entitled to a review as to whether or not the hearing given him by the Company was a "due process hearing". The Opinion prevents that Review in the Trial Court and the record below would show the requirements indicated in Grymes v. Nottoway, Nottoway School Board, 462 F2d 650, Levitt v. Monroe, 590 F.Supp. 902, Duchesne v. Williams, 1987, 821 F2d 1234 were violated. Agent's rights cancellation, App. 73, requires 180 days termination notice for an Independent Agent, whether Petitioner was "an Independent Agent" may be questionable, but he was not an employee according to the contract drawn by STATE FARM which was one exception to the termination. But in any event thé SUPREME COURT on termination of him on February

2, 1988, did not give him written notice, obviously.

PETITIONER WAS DEPRIVED OF A FEDERALLY PROTECTED APPEAL

New Mexico Constitution, Art. VI, Sec. 2 says "an aggrieved party have an absolute right to one appeal". State v. Moore, 87 NM 412 534 P2 1124 (1975). The deprivation occurred because Petitioner did not suffer a directed verdict in the Trial Court because of an adverse determination by the Trial Court that he, as Plaintiff, was terminable "at will". When Petitioner took his Appeal, this issue did not constitute a Trial Court issue. If it had been an issue then the Petitioner could have and would have contested that issue and evidence bearing on whether the Agency Contract was terminable "at will" could have been disputed. The Cases cited previously which dealt with a "due process" hearing for the termination of public employees, illustrate that the issue of employment being "at will" is a factual determination and depends upon the circumstances of each Case, e.g., Marin Piazza v. Aponte Roque, supra, page 67; Christian v.

McKaskle, S.D.Tex.1986, 649 F.Supp. 1475. The Opinion determining "at will" was therefore an exercise of original jurisdiction and the 14th Amendment has been violated under both the "due process" clause and the "equal protection under the law" clause. Blackledge v. Perry, 417 US 21, 25 N.B. 4 (1974), 40 Led. 2d 628, 633, 94 S.Ct. 2098; Bagby v. Beal, 439 F.Supp. 1257, US DC N.D. of Law (1977); Griffin v. Illinois, 351 US 12, 100 Led 891, 76 S.Ct. 585, 55 ALR2d 1055, Cochran v. Kansas, 316 US 225, 86 Led 1453, 62 S.Ct. 1068. The foregoing Case Law has its greatest application to violation of State Constitutional rights. It also gives equal protection to statutory rights. Our Case is based on a State Constitutional right, supra.

THE OPINION VIOLATES

NEW MEXICO'S SEPARATION OF POWERS

Article III, Section 1, [Separation of Departments] says "The powers of the Government of this state are divided into three distinct departments . . . ." App. 79 , and specifically prohibits any usurpation by any of the three

(3) departments. Control over the Insurance Industry has been legislative. Appeal rights from District Court to the SUPREME COURT have been held to be proper legislative functions. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P2d 1354 (1976). The Case of State ex rel. State Corp. Comm'n v. McCulloh, 63 N.M. 436, 321 P2d 207 (1957), held that the District Court had no power to stay in order of the Corporation Commission, since it was an administrative board exercising a legislative function in view of separation of powers doctrine, The New Mexico SUPREME COURT seems to have jealously guarded the independence of each of the three (3) departments, State v. Roy, N.M. 397, 60 P2d 646, 110 A.L.R. 1 (1936); City of Hobbs v. State ex rel. Reynolds, 82 N.M. 102, 476 P2d 500 (1970). The present Opinion shows the difficulty of comprehending an unconstitutional assumption of power by the Judiciary. However, judicial invasion of a legislative function is equally dangerous regardless of the means through which it takes place. There is no State method to correct such abuses by the judiciary.

CONCLUSION

Petitioner advances one additional argument at this time based upon the constitutional right to move freely from state-to-state, Edwards v. Calif., 314 US 160-186, 86 Led 119, 62 S.Ct. 154, which Case contains a number of constitutional reasons why the California Statute violated the U.S. Constitution. The first reason was "the transportation of persons is 'commerce'" within the provisions of Art. I, Sec. 8. The Opinion indicates the necessity of regulation of Interstate Commerce by a single authority, thus approaching our particular Case. This approach was based upon "immunity" from a series of conflicting State Regulations of Interstate Commerce, precisely what the New Mexico SUPREME COURT Opinion causes. For all the reasons advanced herein, Petititioner request Protection and Relief from the State of New Mexico Opinion which unconstitutionally labeled him as an Agent terminable "at will".

Respectfully submitted,

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Filed 2/2/88

IN THE SUPREME COURT

OF THE

STATE OF NEW MEXICO

MITCHELL MELNICK,

Plaintiff-Appellant,

v. No. 16,840

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY and ROBERT C. DEGEER,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
Rebecca Sitterly, District Judge

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Albuquerque, New Mexico
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MILLER, STRATVERT, TORGERSON & SCHLENKER
ALAN KONORD
Albuquerque, New Mexico
for Appellees

O P I N I O N

WALTERS, Justice.

Plaintiff Melnick began a State Farm Insurance Agency in Los Alamos in 1946. On May 13, 1980, State Farm Mutual Insurance Company terminated Melnick's insurance agency contract and ordered him to cease operation of his agency. Melnick requested a termination review hearing, and State Farm impaneled a review committee which recommended that Melnick's termination be upheld. The president of State Farm reviewed the committee's findings and adopted its recommendation. Melnick subsequently filed actions against State Farm and requested a jury trial.

Evidently, Melnick at one time advanced two arguments in the district court: (1) State Farm breached the agency contract in terminating the insurance agency without a showing of good cause; and

(2) State Farm breached an implied covenant of good faith and fair dealing when it terminated the insurance agency. At trial, however, Melnick expressly abandoned the breach of express contract argument, and that claim is not before us. At the close of plaintiff's evidence, State Farm moved for a directed verdict on the implied covenant issue, and the trial court denied the motion. The next morning, however, the judge did direct a verdict for State Farm, entering a judgment which recited that a duty of good faith attaches to the performance of every contract, including contracts terminable-at-will, but that State Farm did not terminate Melnick's agency in bad faith. Melnick moved for a new trial; the court denied the motion, and Melnick appeals.

Melnick claims that the trial judge's reversal of her interlocutory ruling

on directed verdict constituted reversible error, arguing that when she initially denied State Farm's motion, she necessarily found that reasonable minds could differ as to whether State Farm was liable for terminating in bad faith his insurance agency. Without citation to any authority, Melnick claims the trial judge could not thereafter take that issue from the jury by entering a directed verdict in favor of State Farm.

State Farm responds that no covenant of good faith and fair dealing exists or can be implied in an at-will employment relationship of indefinite duration that is defined by a wholly integrated, written contract. In the alternative, State Farm claims that even if a covenant of good faith and fair dealing is implied in an at-will employment contract; it did not terminate Melnick in bad faith.

It is State Farm's position that because it was entitled to judgment as a matter of law, the trial court did not err in directing a verdict in its favor.

Denial of a motion for a directed verdict at the close of a plaintiff's evidence is interlocutory because it leaves the case in the trial court for further proceedings. But the trial court may revise or rescind an interlocutory order at any time before entry of a judgment that concludes the litigation. See Barker v. Barker, 94 N.M. 162, 165, 608 P.2d 138, 141 (1980); State v. Doe, 99 N.M. 460, 463, 659 P.2d 912, 915 (Ct.App.1983). A trial court may reconsider the denial of any motion for directed verdict based on legal issues raised by the motion. Kinetics, Inc. v. El Paso Products Co., 99 N.M. 22, 24, 653 P.2d 522, 524 (Ct.App. 1982) (upholding grant of directed verdict

subsequent to jury deadlock and after twice denying such motion); cf. Becker v. Hidalgo, 89 N.M. 627, 629, 556 P.2d 35, 36-37 (1976) (trial court may grant summary judgment despite previous entry of pretrial order listing contested issues of fact). It was not reversible error, therefore, for the court initially to deny State Farm's directed verdict motion and then later grant it. A trial court has the inherent authority to reconsider its interlocutory orders, and it is not the duty of the trial court to perpetuate error when it realizes it has mistakenly ruled. The focus, then, is whether a directed verdict was warranted in this case.

Our case law consistently has supported the proposition that if reasonable minds can differ on the conclusion to be reached under the evidence or the permissible inferences to be drawn therefrom, the

question is one for the jury and it is error to direct a verdict. E.g., Simon v. Akin, 79 N.M. 689, 690, 448 P.2d 795, 796 (1968). Over the years, however, we have stated in at least three different ways the manner in which a court must consider a motion for a directed verdict. One line of cases has declared that in reviewing a motion for a directed verdict, a court must consider only the nonmoving party's evidence, together with all reasonable inferences which could be deduced therefrom, in a light most favorable to that party. E.g., McGuire v. Pearson, 78 N.M. 357, 358, 431 P.2d 735, 736 (1967).

Second, and similarly, some of our opinions state that courts must accept as true all portions of the nonmoving party's testimony and all reasonable inferences flowing therefrom which tend to prove that party's case and must

disregard all conflicts and all evidence which tend to weaken or disprove it. E.g., Simon, 79 N.M. at 690, 448 P.2d at 796; Simon Neustadt Family Center v. Bludworth, 97 N.M. 500, 507, 641 P.2d 531, 538 (Ct.App.1982). This, too, could be construed to mean that courts may view only the nonmovant's evidence.

Third, later New Mexico cases have said that in reviewing a directed verdict judgment, courts must consider all evidence, insofar as the properly admitted evidence is uncontroverted, and all reasonable inferences deducible therefrom in a light most favorable to the party resisting the motion. That rule was stated by us most recently in Skyhook Corp. v. Jasper, 90 N.M. 143, 146, 560 P.2d 934, 937 (1977), and in Strickland v. Roosevelt County Rural Elec. Coop., 94 N.M. 459, 464, 612 P.2d 689, 694

(Ct.App.1980), cert. denied, 99 N.M. 358, 658 P.2d 433 (1983), and 463 U.S. 1209 (1983). Several earlier cases[1] appear to support this standard of review inasmuch as they reviewed a directed verdict motion granted at the close of all evidence, and in those cases the appellate court said that the trial judge must view "the evidence" in a light most favorable to the nonmoving party.

Oftentimes, when judges consider a directed verdict motion at the close of plaintiff's evidence, only plaintiff's evidence is available to assess. That is not always the case, however; in fact, that is not the case here. State Farm introduced evidence during its cross-examination of Melnick's witnesses. In reconciling the conflict in the scope

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1. See Footnotes.

of review standard announced in our cases, we would think it absurd to ignore uncontradicted testimony, because it may be unfavorable to the nonmovant, in ascertaining whether facts exist which might lead reasonable minds to opposing conclusions. We therefore adopt and reaffirm the better reasoned standard announced in Skyhook, applicable to both trial and appellate courts. Archuleta, 86 N.M. at 95, 519 P.2d at 1176. To the extent that other cases state a contrary standard of review, we overrule those opinions.

Skyhook delineates the correct standard as follows:

> Neither the trial court in ruling upon a motion for a directed verdict, nor an appellate court in reviewing the evidence on appeal from a judgment entered pursuant to a directed verdict, is authorized to consider only the evidence most favorable to the party opposing the motion. All the evidence must be reviewed, but, if there be conflicts or contradictions

> in the evidence, these conflicts must be resolved in favor of the party resisting the motion. Insofar as the properly admitted evidence is uncontroverted, it must be considered. However, if any uncontradicted evidence, including the reasonable inferences deducible therefrom, may reasonable be interpreted in different ways, then the interpretation most favorable to the resisting party must be accepted.

90 N.M. at 146, 560 P.2d at 937. See also Blume, Origin and Development of the Directed Verdict, 48 Mich. L. Rev. 555, 581 (1950) (judge must look at all evidence in considering motion for directed verdict); J. Walden, Civil Procedure in New Mexico § 9c(2)(a), at 225 (1973) (in deciding whether to grant directed verdict, judge may grant motion only after considering all evidence in light most favorable to nonmoving party and arriving at conclusion that evidence as matter of law is insufficient to justify verdict in party's favor). Federal courts have adopted the same

standard of review for a directed verdict motion. See 5A J. Moore, Moore's Federal Practice ¶ 50.02[1], at 50-30 (2d ed. 1987) (federal appellate courts consider all evidence when reviewing directed verdict motion).

To announce a standard of review, however, is far simpler than to apply it. The varying nature of fact situations in each trial prohibits an outline of precise guidelines that would govern the outcome of every directed verdict motion. The principal consideration, however, is recognition that interference with the jury function must be minimized so that erosion of a litigant's right to a trial by jury is not effected. 9 C. Wright & A. Miller, Federal Practice & Procedures § 2524, at 545 (1971). To remove a case from the jury, it should be clear that the nonmoving party has presented no true issues of fact which

that party has the right to have decided by his peers. Sanchez, 57 N.M. at 387, 259 P.2d at 348. If the evidence fails to present or support an issue essential to the legal sufficiency of a legally recognized and enforceable claim, the right to a jury trial disappears. American Employers' Ins. Co. v. Crawford, 87 N.M. 375, 376, 533 P.2d 1203, 1204 (1975). The basis for a directed verdict, therefore, is the absence of an issue for the jury to resolve. Sanchez, 57 N.M. 15 387, 259 P.2d at 348. There is no doubt that a directed verdict enhances judicial efficiency by allowing the trial judge to conclude a jury trial when the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result. Campbell v. Mouton, 373 So.2d 237, 238 (La.App.

1979), cert. denied, 415 So.2d 954 (1982). But it is also a drastic measure, and the language of Sanchez v. Gomez is worth including here:

> [W]e wish to re-emphasize that where the evidence is as controverted as it is in the case at bar, even though, to the presiding judge, the possibility of a recovery by the plaintiff may appear remote and even though the court may be motivated in its action in directing the verdict by a sincere desire to spare the plaintiff from the further and additional expense which more prolonged proceedings may entail, the party aggrieved may not in such manner be deprived of a jury determination.

57 N.M. at 392, 259 P.2d at 351.

Professors Wright and Miller emphasize that the question is not whether literally no evidence exists to support the party against whom the motion is made, but whether evidence exists upon which a jury properly could return a verdict for that party. 9 C. Wright & Miller, § 2524, at 543. Professor Moore suggests that a directed verdict is proper only

when it is obvious to the judge that the nonmoving party has no pretense of a prima facie case. 5A J. Moore ¶ 50.02 [1] at 50-16.1. Professor Walden observes that a directed verdict is proper only when no substantial evidence supports one or more essential elements of the nonmovant's claim. J. Walden, § 9c(3) at 235-36.

Applying the above considerations, we affirm the trial court's judgment entered pursuant to a directed verdict, not because there was a complete absence of evidence of bad faith to support Melnick's claim, but because we do not recognize a cause for action for breach of an implied covenant of good faith and fair dealing in an at-will employment relationship. See Smith v. Price's Creameries, Div. of Creamland Dairies, Inc., 98 N.M. 541, 546, 650 P.2d 825, 830 (1982) (motivation of party in can-

celling contract terminable-at-will is immaterial); Salazar v. Furr's, Inc., 629 F.Supp. 1403, 1410 (D.N.M.1986) (no cause of action for breach of implied covenant of good faith and fair dealing in New Mexico). We are not inclined to redefine the law of at-will employment contracts in New Mexico.

When an employment contract is not supported by any consideration other than performance of duties and payment of wages, and there is no explicit contract provision stating otherwise, it is an employment contract for an indefinite period and terminable-at-will by either party. Sanchez v. The New Mexican, 106 N.M. 76,____, 738 P.2d 1321, 1323 (1987); Virgil v. Arzola, 102 N.M. 682, 685, 699 P.2d 613, 616 (Ct.App.1983), modified, 101 N.M. 687, 687 P.2d 1038 (1984); Garza v. United Child Care, Inc., 88 N.M. 30, 31, 536

P.2d 1086, 1087 (Ct.App.1975). Generally, either an employee or an employer may terminate an at-will employment contract at any time, for any reason, without liability. Sanchez, 106 N.M. at ____, 738 P.2d at 1324; Smith, 98 N.M. at 546, 650 P.2d at 830; Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 791, 635 P.2d 992, 994 (Ct.App.1981). Exceptions to this general rule are: (1) wrongful discharge in violation of public policy (retaliatory discharge); (2) implied contract that restricts the employer's power to discharge; and (3) tortious or contractual breach of an implied covenant of good faith and fair dealing. We recognize the first two exceptions. See Boudar v. E.G. & G., Inc., 106 N.M. 279, ____, 742 P.2d 491, 495 (1987) (addressing breach of implied employment contract and public policy tort); Sanchez, 106 N.M. at ____, 738

P.2d at 1323 (noting public policy, retaliatory discharge exception to employment terminable-at-will rule); Forrester v. Parker, 93 N.M. 781, 782, 606 P.2d 191, 192 (1980) (employer's personnel guide constituted implied employment contract).

Several jurisdictions have permitted suit for breach of an implied covenant of good faith and fair dealing in an employment contract.[2] Courts have defined "bad faith" as conduct by the employer extraneous to the employment contract aimed at frustrating the employee's enjoyment of contractual rights, Khanna v. Microdata Corp., 170 Cal.App.3d 250, 262, 215 Cal.Rptr. 860, 867 (1985); Hinson v. Cameron, 742 P.2d 549, 553 (Okl.1987); have equated "bad faith" with fraud, deceit, or misrepresentation,

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2. See Footnotes.

A. John Cohen Ins. v. Middlesex Ins. Co., 8 Mass.App. 178, 183, 392 N.E.2d 862, 864 (1979); and have acknowledged it in a termination with the intent to deprive wrongfully or unconscionable purpose, Fortune v. National Cash Register Co., 373 Mass. 96, 105, 354 N.E.2d 1251, 1257 (1977); Dull v. Mutual of Omaha Ins. Co., 85 N.C.App. 310, 354 S.E.2d 752, 757.

Numerous other jurisdictions, however, as New Mexico, have refused to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in at-will employment contracts.[3] Although Arizona and Connecticut have adopted an implied covenant of good faith and fair dealing in employment at-will contracts, they have rejected the contention that a no-cause termination

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3. See Footnotes.

breaches the implied covenant. See Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 385, 710 P.2d 1025, 1040 (1985) (covenant protects employee from discharge based on employer's desire to infringe on contractual rights such as payment of benefits earned, but does not protect discharge to avoid tenure required to earn pension or retirement benefits); Magnan v. Anaconda Indus., Inc., 193 Conn. 558, ____, 479 A.2d 781, 788-89 (1984) (breach of implied covenant of good faith cannot be predicted on absence of good cause for discharge from at-will employment). But see Gerdlund v. Electronic Dispensers Int'l, 190 Cal.App.3d 263, ____, 235 Cal.Rptr. 279, 286 (1987) (covenant of good faith and fair dealing sometimes requires showing of good cause for termination when contract silent or ambiguous on subject).

We align also with those courts that have refused to apply an implied covenant of good faith and fair dealing to override express provisions addressed by the terms of an integrated, written contract.[4] We cannot change or modify the language of an otherwise legal contract for the benefit of one party and to the detriment of another. Smith, 98 N.M. at 545, 650 P.2d at 829. "Contractual provisions relating to termination or cancellation of an agreement not arrived at by fraud, or unconscionable conduct, will be enforced by law. [Citations omitted.] Where a contract provides for a manner by which termination can be effected, those provisions must ordinarily be enforced as written." Id. at 546, 650 P.2d at 830. At least two jurisdictions have held a State Farm Insurance Agency

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4. See Footnotes.

contract, similar to, if not identical with the Melnick contract, to be unambiguous and integrated, to be terminable-at-will, and not to require a showing of cause to terminate the insurance agency. See Mooney v. State Farm Ins. Co., 344 F.Supp. 697, 700 (D.N.H.1972); Scola v. State Farm Ins. Co., No. 1 Civ. 46985 (Cal.Ct.App.1981).

The agency contract between Melnick and State Farm was fully integrated, clear, and unambiguous, and we decline to rewrite the valid agreement by imposing an obligation not found in its specific, express terminology. It recites that the contract "constitutes the sole and entire Agreement between the parties hereto", and that "[y]ou or State Farm have the right to terminate this Agreement by written notice delivered to the other . . . ." Upon termination of an agency by State Farm, the agent is entitled

to a termination review hearing and to termination payments. Although dissatisfied with the membership of the review panel and the presentation of charges and evidence against him, Melnick concedes that State Farm adhered to all procedures governing the termination review and made all termination payments. Having closely reviewed the entire contract, we are obliged to conclude that Melnick is entitled to nothing further. He was an independent contractor under the agreement, the agreement was for an indefinite period, and it was, therefore, terminable-at-will.

This decision does no injury to the law of contracts or of employment. Parties to a contract may negotiate and bargain for provisions which are beneficial to them. A dissatisfied party to a valid contract should not be allowed to rewrite the provisions

to which he initially assented. Although an employer may agree to restrict or limit his right to discharge an employee, to imply such a restriction in an employment-at-will relationship, which by its very nature has no restrictions, is inherently unsound. Thompson, 102 Wash.2d at 228, 685 P.2d at 1086.

Employers are entitled to be motivated by and to serve their own legitimate business interests, and they must have wide discretion and flexibility in deciding who they will employ in an uncertain business world. Fortune, 373 Mass. at 102, 364 N.E.2d at 1256. The employers' interests in conducting their businesses as they see fit must be balanced with the interests of their employees in keeping their jobs. Thompson, 102 Wash.2d at 227, 685 P.2d at 1086. But to imply in every employment situation a covenant of good faith prohibiting

dismissal except for good cause could be likened to a judicial call for collective bargaining. Magnan, 193 Conn. at ____, 479 A.2d at 788; Thompson, 102 Wash.2d at 228, 685 P.2d at 1086-87. Protection of employees does not require such a restriction on an employer's discretion in managing his work force or such an imposition upon the courts. Parnar, 65 Haw. at 377, 652 P.2d at 629; Brockmeyer, 113 Wis.2d at 569, 335 N.W.2d at 838.

Giving effect, then, to the continued vitality of the employment-at-will doctrine, we hold that in the absence of a showing of improper motivation, overreaching, or discharge for a reason contrary to public policy, Melnick was not entitled to a showing of good cause or an absence of bad faith before State Farm could terminate his agency.

Because Melnick has no cause of action

for breach of implied covenant of good faith and fair dealing, and because State Farm was entitled to judgment as a matter of law, the judgment entered pursuant to a directed verdict in the district court is AFFIRMED.

IT IS SO ORDERED.

s/
MARY C. WALTERS, Justice

WE CONCUR:

s/
DAN SOSA, JR., Senior Justice

s/
HARRY E. STOWERS, JR., Justice

FOOTNOTES

1. See Archuleta v. Pina, 86 N.M. 94, 95, 519 P.2d 1175, 1176 (1974); Sanchez v. Gomez, 57 N.M. 383, 387, 259 P.2d 346, 348 (1953); Morris v. Cartwright, 57 N.M. 328, 332, 258 P.2d 719, 722 (1953); Cavazos v. Geronimo Bus Lines, 56 N.M. 624, 627, 247 P.2d 865, 866 (1952); Sandoval v. Cortez, 88 N.M. 170, 173-74, 538 P.2d 1192, 1195 (Ct.App. 1975); Brown v. Hall, 80 N.M. 556, 557, 458 P.2d 808, 809 (Ct.App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

2. See, e.g., Petersen v. First Fed. Sav. & Loan Ass'n of Puerto Rico, Inc., 617 F.Supp.1039, 1042 (D.V.I.1985) (recognizing cause of action for implied covenant of good faith and fair dealing in at-will employment contract); Mitford v. De Lasala, 666 P.2d 1000, 1007 (Alaska 1983) (same); Cleary v. American Airlines, Inc., 111 Cal.App.3d 443, 453, 168 Cal. Rptr. 722, 728 (1980) (concept of good faith and fair dealing applies to all contracts); Albee v. Wolfeboro R.R. Co., 126 N.H. 176, 179, 489 A.2d 148, 151 (1985) (every contract contains implied covenant of good faith and fair dealing); Association Group Life, Inc. v. Catholic War Veterans, 61 N.J. 150, 153, 293 A.2d 382, 384 (1972) (implied covenant of good faith and fair dealing in every contract).

3. See, e.g., Goldblum v. Union Mut. Life Ins. Co., Nos. H-84-1675, H-84-4355, H-85-5156 (S.D.Tex.1987) (WESTLAW, Allfeds library, Dist file); Scholtes v. Signal Delivery Serv., Inc., 548 F.Supp. 487, 494-95 (W.D.Ark.1982); Pittman v. Larson

Distrib. Co., 724 P.2d 1379, 1385 (Colo. App.1986); Parner v. American Hotels, Inc., 65 Haw. 370, 377, 652 P.2d 625, 629 (1982); Morriss v. Coleman Co., 241 Kan. 501, ____, 738 P.2d 841, 851 (1987) (implied covenant of good faith and fair dealing is overly broad and should not apply to employment at-will contracts); Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 858 (Minn.1986); Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W. 822, 824, (Mo.App.1985); Jeffers v. Bishop Clarkson Memorial Hosp., 222 Neb. 829, 833, 387 N.W.2d 692, 695 (1986); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 304-05, 461 N.Y.S.2d 232, 239, 448 N.E.2d 86, 89, (1983) (refusing to adopt cause of action for tortious discharge of at-will employment contract); Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 214 (N.D. 1987); Hinson, 742 P.2d at 554 (same); Jones v. Keogh, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979) (no remedy for employee at-will discharged as result of bad faith, malice or retaliation); Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 579, 335 N.W.2d 834, 838 (1983); Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 227, 685 P.2d 1081, 1086 (1984).

4. See Goldblum, supra n. 3 (no implied covenant as to matter specifically covered by written contract); Borbely v. Nationwide Mut. Ins. Co., 547 F.Supp. 959, 975 (D.N.J.1981) (no support for proposition that implied covenant of good faith

and fair dealing may impose condition in direct contravention of unequivocal provision in cotract covering identical subject); Abrahamson v. NME Hosp., Inc., 195 Cal.App.3d 1325, ____, 241 Cal.Rptr. 396, 399 (1987) (refusing to engraft upon employment contract covenant of good faith and fair dealing because contract clear and unambigious, and covenant would rewrite it); Gerdlund, 190 Cal.App.3d at ____, 235 Cal.Rptr. at 286 (no obligation can be implied which would overrule express right conferred in contract); Exxon Corp. v. Atlantic Richfield Co., 678 S.W.2d 944, 947 (Tex.1984) (no implied covenant as to matters expressly and unambiguously covered by written contract); Mann v. American Western Life Ins. Co., 586 P.2d 461, 465 (Utah 1978) (reaffirming strong reluctance to rewrite contracts for litigants because consequences of enforcement of contracts they signed seemed unfair).

Filed 2/17/88

IN THE SUPREME COURT

FOR THE

STATE OF NEW MEXICO

MITCHELL MELNICK,

Plaintiff - Appellant,

vs. No. 16,840

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM GENERAL INSURANCE COMPANY, and ROBERT C. DEGEER,

Defendants - Appellees.

MOTION FOR RECONSIDERATION

Comes now the Plaintiff-Appellant, Mitchell Melnick, and requests that the Supreme Court reconsider its decision entered in this case on February 2, 1988. As an introduction, Appellant states that both sides very much wanted to win. The State Farm Amalgamated Companies did win in the Supreme Court of New Mexico on grounds which eliminated a jury trial. Further, it was on grounds that were not the trial issues below. The Supreme Court initiated its own

Directed Verdict Motion after finding that the trial judge was incorrect in her finding that there was no evidence of bad faith. The Supreme Court essentially says to Plaintiff: you were entitled to go to the jury, but then adds, we find our motion for directed verdict, which we made in the opinion to be meritorious, and therefore, you are not entitled to a jury trial. The right to a jury trial is a constitutional right as stated in the New Mexico Constitution which is protected by the 14th Amendment to the United States Constitution. It seems clear that if the New Mexico Supreme Court is going to make its own motion for a directed verdict on issues that were not before the trial court, then the Supreme Court is going to grant its own motion. It does indicate that the Supreme Court of New Mexico has the power to make and then grant its own motions. This method is unconstitutional under both the State and Federal Constitutions. There is a denial of due process and equal protection of the laws under article II, section 18 of the State Constitution and under the 14th Amendment to the Federal Consti-

tution. The opinion is unconstitutional as to both sides. Plaintiff is deprived of a jury trial by a violation of due process; Defendant State Farm is deprived of the property right to run its own business, to make its own commitments to its agents and to make the decisions as to how to litigate with its agent. This is a violation of the right to own private property. It is an unconstitutional blow to private ownership which includes the right of a private corporation to control its own business. The opinion grants ownership to the state. It is a usurpation of individual freedom under a constitutionally protected free enterprise system.

Defendant State Farm did not ask the Supreme Court to make a motion for a directed verdict for it in the Supreme Court. In fact, State Farm, acting through its President, Ed Rust, stated under oath that it did not and would not make an attempt to win the case on the grounds advanced by the Supreme Court. President Rust was clothed with full authority to make the decision that Mitchell Melnick's agency agreement was not terminable by State Farm at

will, and had to be terminated if at all for "cause" because he had made Mr. Melnick a lifetime member of the President's Club and lifetime membership means just that. It is not for an indefinite period as the opinion frequently describes it. The opinion is a destruction of the right of a corporation to make its own contracts and to conduct its own business. Lifetime membership in the President's Club is an incentive for production. State Farm has over $20 billion in assets. When the far flung magnitude of the opinion is considered, it seems difficult to believe that the Supreme Court would make a corporate policy announced by President Rust to be a deception to the agents and a fraud upon them. What does the rejection of Mr. Rust's promises to hundreds of agents do to the stability of the whole organization? Since courts are a part of government, it is a confiscation of a private property right in violation of our entire private enterprise system. A constitution is always a limitation upon the government for the benefit of the people. This opinion does not recognize any limitation and

now decides, after the fact, to annul corporate decisions when the company did not ask it to do so. How could the company not lose complete credibility with thousands of agents and insureds if a State Court can destroy the program and the promises made to the agents as an inducement for high production? State Farm no doubt wants to win its case with agent Mitchell Melnick, but only on a "cause" termination. State Farm would certainly not want to win this case if that means handing over to a Western State Court the right to make decisions on how it will run its business and destroy the reliability of the President's promises. The company is in charge of its litigation, not the company's attorneys and not the courts. The Canon of Ethics absolutely place control of litigation on the client unless the client wants something illegal to be done. In such a situation, the attorney can withdraw but cannot force his will upon his client.

President Rust's testimony is a sworn part of this case. Besides, State Farm did not terminate Mr. Melnick except for cause. They spent over a year in

trying to get something on Mr. Melnick so that he could be terminated for cause. This was under the direction of a New Jersey Attorney, David Hanis. He appeared before this court personally and was eliminated as an attorney in the case because he was a witness. Why was he a witness in this case? Because he headed a team of investigators who were trying to "get something" on Mr. Melnick so he could be terminated for cause. At the "cause" hearing, Attorney Hanis had hundreds of pages of investigative material.

Mr. Rust was more than the Chief Executive in so far as terminations were concerned. He was made the authority by the Board of Directors. That authority was amplified in the directives laying down the rules for termination. State Farm does not need any court to overrule its termination procedures. No one can dispute Mr. Rust's decision and make him out to be a fraud by revoking his decision on Mr. Melnick as a lifetime member.

Why would State Farm spend money and time on a "cause" hearing when, according to the court, they could have

terminated the agent "at will"? Obviously State Farm did not want to do so and did not in fact do so. By what constitutional provision can a court reverse that corporate decision?

The opinion never mentions Mr. Rust's sworn testimony eliminating "termination at will" which was the sole issue raised by the Supreme Court on its own motion. This issue which the Supreme Court found decisive was not made public at the oral agreement and was not an issue on the appeal. If it had been an issue, Appellant certainly would have relied on President Rust's testimony that State Farm as a matter of company policy, did not and would not terminate agents except for cause. President Rust rejected the "at will" termination theory. It was not State Farm's policy or practice to terminate agents "at will".

The Constitutional issue is whether a Supreme Court, acting as an Appellant Court, can make its own motion, decide it without argument from either side, grant its own motion and announce it for the first time on appeal. The most important single piece of evidence was not considered by the court in reaching

its decision - President Rust rejected the theory that it could terminate agents without cause. It is fundamental to our system that there must be a hearing with an opportunity to present evidence. An Appellant Court cannot exercise original jurisdiction on appeal. The Supreme Court was sitting as an Appellate Court. Numerous cases hold that a point not raised below cannot be raised on appeal. What the opinion in this case holds is that an issue not decided below will be raised for the first time on appeal by the Appellate Court. Such a procedure violates the right to a trial by jury.

The effect of such a procedure on attorneys and trial judges is destructive. Both sides would have to litigate all possible issues that could be conceived in a set of facts for fear that the Appellate Court might rule on an unlitigated issue without allowing evidence to be developed on that issue.

There is a New Mexico case cited in the opinion which is directly on point - Forrester v. Parker, 93 N.M. 781, 606 p.2d 191 (1980). That case found for the Plaintiff. All the other cases cited purporting to uphold termina-

tion at will are not in point because they did not include facts such as President Rust's testimony. Forrester, supra, barred termination at will because the personnel guide outlined certain measures for termination and was applicable after the employee had 6 months service. That case is decisive here on the assumption that this court did not know of President Rust's rejection of at will termination of agents, should not the opinion be withdrawn and the case remanded for a jury trial?

The opinion says that Judge Sitterly's directed verdict was wrong - there was not an absence of evidence of bad faith. Then the opinion reverses Judge Sitterly's decision that there is an implied covenant of good faith in every contract. This court also rejects by implication the case of Fantl v. Joyce Pruitt Co.; 34 N.M. 573, 577, 286 p. 830 (1930) which involved an agency contract. The Supreme Court stated there that, "the contract creates a relation of trust and confidence. It demands good faith. Without it the relation is intolerable." In addition, State Farm has expressly rejected the basis of this courts opinion;

termination at will was never briefed or argued in this court. Appellant never had an opportunity to present the evidence on that issue. All the witnesses testified that this was a "cause" termination. The agents were advised by State Farm that a termination could be done only if there was cause. The termination review committee had to make "Findings of Fact" to support its decision that there was cause to terminate an agent. State Farm's whole procedure was geared that way. The termination review procedures adopted by State Farm's Board of Directors were part of the agreement between the agent and the company. State Farm and President Rust voluntarily made Mr. Melnick a lifetime agent who could be terminated only for cause. State Farm accepted the fact that it could only terminate Mr. Melnick for "cause". The trial exhibits from State Farm's files refer several times to the fact that State Farm in 1978 did not have "facts" to justify terminating Mr. Melnick, and therefore, State Farm knew it could not terminate him. It was only after an extensive investigation, conducted

by State Farm officials in Santa Fe, Tempe, and Bloomington, that State Farm came up with what it felt were sufficient facts to terminate this agent. It is a corporate decision in the first instance whether that company will try to reserve the right to terminate at will. However, if a company decides it will terminate only for cause, that corporate decision cannot later be overturned by a court.

An Appellate Court ruling affirming a lower court judgement on a directed verdict, which was based on different grounds than the Appellate Court's decision, violates due process because there was never a hearing in this court on the substituted grounds.

Appellant requests that this court reconsider its decision and remand the case for jury trial.

KLECAN & SANTILLANES, P.A.

s/
JANET SANTILLANES

Filed 8/12/82

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

MITCHELL MELNICK,

Plaintiff.

vs. No. SF82-1525(c)

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM GENERAL INSURANCE COMPANY, and ROBERT C. DE GEER,

Defendants.

COMPLAINT FOR DAMAGES

COMES NOW the Plaintiff, Mitchell Melnick, and for cause of action alleges:

1. That he is a resident of Los Alamos County, New Mexico.

2. That the company Defendants are licenses to do business in the State of New Mexico as insurance companies, each of said companies is organized under the laws of the state of Illinois.

3. That the Defendant Robert C. DeGeer is a resident of Bernalillo County, New Mexico, and a citizen of New Mexico.

4. That all the company Defendants have appointed the Superintendent of

Insurance for the State of New Mexico as their Statutory Agent. The Superintendent resides in Santa Fe County, New Mexico.

5. That about thirty-five years ago the Plaintiff and State Farm entered into a State Farm Agent's Agreement.

6. That all four of the State Farm companies combined for said agreement which was prepared by the State Farm companies, who acted as a unit throughout referring to themselves as "collectively". Hereinafter the four companies will be denominated "State Farm".

7. That the Defendants violated their Agent's Agreement and Supplements to the same culminating in a wrongful and tortious termination of the Plaintiff as an insurance agent operating an insurance agency. Defendant DeGeer participated in these wrongful acts.

8. That the termination procedures were in violation of agreements between the Plaintiff and State Farm and also violated the Plaintiff's due process rights.

9. That in execution of the wrongful termination as aforesaid, the Defendants converted the properties of the Plaintiff

to their own use by appropriating insurance contracts of insureds on policies sold by the Plaintiff and in which he had a property interest.

10. That this was a direct result of the wrongful termination and was itself a violation of the Plaintiff's rights in his insurance business, including its goodwill, located in Los Alamos city and which he had built up continuously over a thirty-five year period.

11. That the compensation paid to the Plaintiff for appropriating his property was illegal, inequitable and imposed by duress upon the Plaintiff.

12. That the above tortious interference with a business relationship established between the Plaintiff and his clients caused damages to the Plaintiff.

13. That the Defendants, including Defendant DeGeer, engaged in fraudulent conduct against the Plaintiff culminating in an illegal and lack of due process termination as aforesaid.

14. That the Defendant DeGeer tortiously interfered with the Plaintiff's business rights and violated agreements he had made with the Plaintiff relative to the conduct of the insurance business.

15. That Defendants have failed to account to Plaintiff on returns and premiums rightfully belonging to Plaintiff.

16. That an agreed geographical assignment of territory for the conduct of the Plaintiff's insurance business was violated, and the Defendant DeGeer conspired with the company Defendants and others in the company Defendants' organization to take away the business rights of the Plaintiff in the insurance business and did so by fraud and deceptive methods for which the Plaintiff requests punitive damages.

17. That Plaintiff has been damaged in the sum of $1,085,000.

WHEREFORE, Plaintiff prays for judgment against Defendants for compensatory damages in the amount of $1,085,000, and for punitive damages, together with costs, prejudgment interest and attorney's fees.

KLECAN & SANTILLANES, P.A.

/s/EUGENE E. KLECAN

Filed 11/10/86

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 82-1525(c)

MITCHELL MELNICK,

Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants.

JUDGMENT

This case came on for jury trial beginning September 3, 1986. Following Plaintiff's presentation of his case, Defendants moved for a directed verdict pursuant to N.M.R.Civ.P. 50(a). The Court having considered the evidence presented, the arguments of counsel for the parties, and being otherwise fully advised in the premises, FINDS:

1. As a matter of law, a duty of good faith attaches to the performance of every contract, including a contract terminable at will;

2. The contract which Plaintiff

claims was breached in this case was a contract terminable at will;

3. The acts of Defendants of which Plaintiff complained do not constitute actionable bad faith as a matter of law; and,

4. Reasonable minds could not differ on whether Defendants' conduct operated to proximately cause any of Plaintiff's damages.

For the foregoing reasons, the court finds Defendants' Motion for Directed Verdict to be well-taken.

Both Plaintiff and Defendants submitted Cost Bills and Objections to the others' Cost Bills. The Court having considered the materials submitted by the parties, the arguments of counsel, and being otherwise fully advised in the premises, finds that the parties should bear their own costs. While Defendants are the prevailing parties, on the outcome, they did not prevail on each issue, and further, the case involves issues of first impression in New Mexico and, as such, Plaintiff has shown good cause why Defendants should bear their own costs.

IT IS THEREFORE ORDERED, ADJUDGED,

AND DECREED that Judgment is entered for Defendants, and the parties are to bear their own costs incurred herein.

/s/
DISTRICT JUDGE

APPROVED AS TO FORM:

KLECAN & SANTILLANES, P.A.

By: (Refused to sign, but present for two presentment hearings.)
Attorneys for Plaintiff

MILLER, STRATVERT, TORGERSON & SCHLENKER, P.A.

By: /s/
Attorneys for Defendant

Filed 7/10/87

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

MITCHELL MELNICK,

Plaintiff-Appellant,

v. No. 16,840

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY and ROBERT C. DEGEER,

Defendants-Appellees.

APPEAL FROM THE
FIRST JUDICIAL DISTRICT COURT

SANTA FE COUNTY, NEW MEXICO
THE HONORABLE REBECCA SITTERLY,
DISTRICT JUDGE

APPELLANT'S BRIEF-IN-CHIEF

KLECAN & SANTILLANES, P.A.
Attorneys for Plaintiff-Appellant

I N D E X

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

MITCHELL MELNICK,

Plaintiff-Appellant,

v. No. 16,840

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY and ROBERT C. DEGEER,

Defendants-Appellees.

APPEAL FROM THE
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY, NEW MEXICO
THE HONORABLE REBECCA SITTERLY,
DISTRICT JUDGE

ANSWER BRIEF

ALAN KONRAD, ESQ.
Attorneys for Defendants-
Appellees

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II. MELNICK DID NOT MAKE OUT A PRIMA FACIE CASE OF LIABILITY (ANSWER TO POINT I).

A. Melnick's Sole Contention On Appeal Appears To Be That He Was Not Provided With "Proper Procedures," But No Evidence Supports That Position.

In the trial court, once Melnick identified his claim, he asserted that the claim was that the termination review had been a "kangaroo court". Similarly, in the Brief in Chief, Melnick states that "proof of a 'kangaroo court' was the plaintiff's case" [22], that "if the review hearing had been fairly conducted, Mitchell Melnick would not have been terminated," [26], etc.

The only case cited in the Brief in Chief for the position that State Farm did anything wrong is Francis v. Memorial General Hospital, et al., 104 N.M. 698, 726 P.2d 852 (1986). Melnick states that Francis stands for the position that "an employee has a 'right to proper procedures in his termination.'" There is no dispute about this proposition. In Francis, this Court affirmed the summary judgment granted the defendant employer. The defendant employer's manual provided for a "fact finding

hearing". The plaintiff was not permitted to have his attorney attend the fact finding hearing; plaintiff therefore refused to attend; and his employment was terminated. This Court held that the due process clause of the Constitution applied, but that it was not violated by the defendant employer's exclusion of lawyers.

State Farm is a private entity to which the due process clause does not apply. The procedures to which Melnick was entitled are the procedures set forth in the termination review procedures, Exhibit WW. Melnick does not and did not identify a single procedure which was violated by State Farm. In the court below, Melnick's attorney conceded that none had been violated. T 65 (520) Melnick's claim is that procedures other than those agreed upon by the parties should have been used, because other procedures would have been "fairer" to Melnick, in his opinion.

To present a point for consideration on appeal, the appellant must submit argument and must submit authorities to support the argument. Petritsis v. Simpier, 82 N.M. 474 P.2d 490 (1970).

Melnick provides no support for his position that he was entitled to receive procedures other than those to which he and State Farm had agreed. Melnick introduced no evidence that any of the procedures were violated, and stated that the procedures had not been violated. The trial court did not err in granting State Farm's motion for directed verdict.

B. An Implied Covenant Of Good Faith Does Not Give Melnick A Claim For Relief In This Case

In Virgil, supra, New Mexico considered and rejected the argument that a covenant of good faith and fair dealing should be implied into at-will employment relationships of indefinite duration. The prevailing doctrine in this country is the doctrine adopted in Vigil -that an employee terminated in violation of a clear cut mandate of public policy has a claim for "retaliatory discharge", but not for breach of an implied covenant of good faith and fair dealing. Sanchez v. The New Mexican, Inc., S.B.B. Vol. 26, No. 32 (August 13, 1987).

The "retaliatory discharge" theory adopted in Vigil is not applicable to

the case at bar -- this case was filed before the effective date of Vigil and Melnick never identified any specific expression of public policy which was allegedly violated by State Farm. Vigil and its progeny are nonetheless very important in this case, because there are two factors present here, not present in ordinary at-will employment relationships, which militate against imposing an implied covenant of good faith and fair dealing. The first is that this case involves an independent contractor, not an employee; the second is that this case involves a written contract containing express provisions relating to termination.

In the case at bar, the parties -- an independent contractor and his principal -- expressly agreed that either party had the "right to terminate" by written notice to the other. Ex. N The Agreement further provides that it is "the sole and entire agreement between the parties . . . ." Imposing additional obligations would be contrary to the intent of the parties, as reflected by their agreement that the written contract constitutes the sole and entire

agreement between them. This is exactly the result reached by the courts which have considered the issue.

California goes much further than New Mexico in recognizing claims on behalf of a terminated at-will employee. California recognizes a claim for breach of an implied covenant of good faith and fair dealing in ordinary, at-will employer-employee relationships. However, California does not recognize a claim for breach of an implied covenant of good faith and fair dealing in principal-independent contractor relationships governed by written contracts.

In Sherman v. Mutual Benefit Life Insurance Co., 633 F.2d 782 (9th Cir. 1980), the Ninth Circuit, applying California law, considered the following contention by a terminated insurance agent:

> [Plaintiff] maintains that even if the agency agreement was intended to be terminable without cause, California law nonetheless creates an implied covenant of good faith and fair dealing in the performance of contracts.

The Ninth Circuit rejected the contention that the company's termination of plaintiff had amounted to a legal wrong,

since the presence of "ill will" or "improper motive" could not affect the right to terminate at will. The court also noted that "at-will" insurance agency contracts could be lawfully terminated irrespective of good faith. 633 F.2d at 728. See also, Sullivan v. Massachusetts Mutual Life Ins. Co., 611 F.2d 261 (9th Cir. 1979).

In Scola v. State Farm, a copy of which appears in the record at R 437-41, the California Court of Appeals affirmed a summary judgment for State Farm in a lawsuit in which plaintiff alleged that State Farm violated the State Farm Agent's Agreement and committed various torts by terminating him. Based upon the State Farm Agent's Agreement (identical to the one involved in the case at bar), the court held that the agent could be terminated at will.

The California cases are discussed in "Termination of Insurance Agents: Where are the Courts Taking Us?," Gadarowski, The Forum, Vol. XXVIII, Spring, 1983, at 451:

> The [Scola] decision, albeit unpublished, does come approximately nine months after the California Supreme Court in Tamney v. The

> Atlantic Richfield Co. with its famous footnote 12. This footnote made reference to a possible cause of action for breach of an implied covenant of good faith and fair dealing inherent in every contract . . . . The significance of the [Scola] case may mean that agent termination cases are to be treated differently from employee termination cases, except as to public policy matters, because the agent is an independent contractor or because there is a written agreement involved. (Emphasis added.)

Id., 456.

In 1987, the California Court of Appeals decided Gerdlund, et al v. Electronic Dispensers International, 235 Cal. Rptr. 279, 190 Cal.App.3rd 263 (Ct. App. 1987). Plaintiffs, former sales representatives of defendant, sued defendant for wrongful termination. The sales representatives and defendant had entered into written contracts, which provided that they could be terminated upon written notice. The trial court instructed the jury that "there is an implied covenant of good faith and fair dealing in any contract . . . ." Judgment was entered in plaintiff's favor on plaintiffs' claim for breach of the implied covenant. The Court

of Appeals reversed, and directed the trial court to enter judgment in favor of defendant, because the privilege of termination was absolute, and "no obligation can be implied . . . which would result in the obliteration of a right expressly given under a written contract."

Cases from other jurisdictions are in accord. For example, in Exxon Corp. et al. v. Atlantic Richfield Co., 678 S.W.2d 944 (Texas 1984), the Supreme Court of Texas considered an appeal from a summary judgment granted the defendants in a suit alleging breach of the termination provisions of a contract. The plaintiff could not identify any specific termination procedure which had been violated by the defendants, but contended that an implied covenant of good faith and fair dealing had been breached in the termination of the contracts.

> There can be no implied covenant as to matters specifically covered by the written terms of a contract. [Citation omitted] The agreement made by the parties and embodied in the contract itself cannot be varied by an implied good faith and fair dealing covenant. [Citation omitted] All parties agreed

> upon the termination clause. These clauses expressly and unambiguously set out the terms under which the contract could be terminated. There can be no implied covenant to the contrary.

678 S.W.2d at 947.

A number of cases have considered specifically whether a terminated insurance agent had a claim for breach of an implied covenant of good faith against an insurance company, where the parties had written contracts of indefinite duration providing that they could be cancelled upon written notice. The cases reject the contention that the contractual right to terminate can be restricted by implication of a covenant of good faith. Baker v. The Penn Mutual Life Insurance Co., 788 F.2d 650, 654-57 (10th Cir. 1986); Mann v. American Western Life Insurance Co., 586 P.2d 461, 464 (Utah 1978); Borbely, et al, v. Nationwide Mutual Insurance Company, 547 F. Supp. 959, 975 (D.N.J. 1981).

This case involves a wholly integrated written contract between an independent contractor and his principal. The contract is of indefinite duration, and expressly provides that either party

may terminate it by giving written notice to the other. There appears to be nothing in New Mexico law which would prevent parties to a contract from agreeing upon provisions concerning termination of the contract. As a matter of law, Melnick does not have a cause of action for breach of an implied covenant of good faith and fair dealing concerning his termination, when the termination complied with the contractual provisions agreed to by the parties.

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

MITCHELL MELNICK,

Plaintiff-Appellant,

v. No. 16,840

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, STATE FARM LIFE INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY and ROBERT C. DEGEER,

Defendants-Appellees.

APPEAL FROM THE
FIRST JUDICIAL DISTRICT COURT
SANTA FE COUNTY, NEW MEXICO
THE HONORABLE REBECCA SITTERLY,
DISTRICT JUDGE

APPELLANT'S REPLY BRIEF

KLECAN & SANTILLANES, P.A.
Attorneys for Plaintiff-Appellant

I N D E X

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO
Friday, February 26, 1988

No. 16,840

MITCHELL MELNICK,

Plaintiff-Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al

Defendants-Appellees.

This matter coming on for consideration by the Court upon Motion of Appellant for rehearing, and the Court having considered said motion and now being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for rehearing is hereby denied.

MELNICK V. STATE FARM **No. 16,840**

ON MOTION FOR REHEARING

RANSOM, Justice.

Not having participated in the original opinion, I specially concur in the denial of appellant's motion for rehearing.

I would hold that each party is required to act under contract in good faith. Terminable-at-will employment contracts represent no exception. While good cause for termination is not required, good faith and fair dealing do require the absence of dishonest, ulterior purpose, e.g., solely to do harm to the other party. The opinion of this Court recognizes that an employment-at-will contract may be breached by a termination representing improper motivation or overreaching, by fraud or unconscionable conduct. Such a termination would be in violation of the implied covenant of good faith and fair dealing. Considering all the evidence in a light most favorable to Melnick, the trial court properly directed a verdict in favor of State Farm. The party asserting a breach of the implied

convenant of good faith and fair dealing has the burden of showing bad faith. There was no evidence of bad faith.

IN THE SUPREME COURT
OF THE
STATE OF NEW MEXICO

MANDATE NO. 16,840

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for County of Santa Fe, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered SF-82-1525(C), your Civil Docket, wherein Mitchell Melnick was Plaintiff and State Farm Mutual Automobile Insurance Company, et al were Defendants, by your consideration in that behalf judgment was entered against said Plaintiff; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by Plaintiff by appeal, whereupon such proceedings were had that on February 2, 1988, an Opinion was handed down by said Supreme Court and Judgment was entered affirming your judgment aforesaid, and remanding said cause to you.

NOW, THEREFORE, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said Opinion and said Judgment.

WITNESS, The Hon. Tony Scarborough, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 26th day of February, 1988.

(S E A L)

/s/
Clerk of the Supreme Court of the State of New Mexico.

Continued from "f". . .
not be deemed to exclude as "mutual" insurers certain foreign insurers found by the superintendent to be organized on the mutual plan under the laws of the state of domicile, but having temporary share capital or providing for election of the governing body on other reasonable basis.

59A-5-10. Certificate of authority required; penalty.

A. No person shall act as an insurer, and no insurer shall transact insurance in this state by direct solicitation or solicitation through the mails or otherwise, unless so authorized by a subsisting certificate of authority issued by the superintendent, except as to such transactions as are expressly otherwise provided for in the Insurance Code.

59A-5-12. General eligibility for certificate of authority.

To qualify for and hold authority to transact insurance in this state, an insurer must have accepted in writing all of the laws of New Mexico, be otherwise in compliance with the Insurance Code and with its charter powers, and must be an incorporated stock and mutual

insurer, or a reciprocal insurer, or Lloyds insurer; . . . .

ARTICLE II
Licensing Procedures, Agents, Solicitors, Brokers, Adjusters and Others

59A-11-1. Scope of article.

A. This article provides as to procedures in licensing insurance agents, solicitors, brokers, surplus line brokers and adjusters; . . . .

59A-11-2. Application for license, individual.

A. Where license is now or hereafter required under the Insurance Code as to categories referred to in Section 180 [59A-11-1 NMSA 1978] of this article, application therefor by an individual shall be filed with, and on form prescribed and furnished by, the superintendent. The application shall be signed by the applicant, under oath if required by the form, and by or on behalf of the proposed principal where expressly required in the form.

59A-11-6. Examination of applicant.

Where the applicant for a license is required to take and pass an examina-

tion prior to issuance of license applied for, such examinations shall be subject to the following provisions:

59A-11-8. Issuance, refusal of license; refundability of fees.

A. If the superintendent finds that the application is complete, that the applicant has passed all required examinations and is otherwise qualified for the license applied for, he shall promptly issue the license.

59A-11-10. Continuation, expiration of license.

A. Each license, other than insurance agent, issued under this article shall continue in force until it is suspended, revoked or otherwise terminated.

59A-11-12. Appointment of agents; continuation.

A. Each insurer or other principal appointing an agent in this state shall file with the superintendent a written appointment specifying the name and address of the appointee and the kinds of insurance or business to be transacted by the agent.

59A-11-13. Agents' rights; cancellation.

A. No insurer shall terminate a contract appointing any person as an

independent agent without giving the agent written notice of the termination at least one hundred eighty days prior to the termination.

B. The provisions of Subsection A of this section shall not apply to termination of a contract for any of the following: fraud or intentional misrepresentation by the agent, either to the insurer or to an insured.

59A-11-14. Suspension, revocation, refusal to continue license; grounds.

A. In addition to reason therefor provided under other provisions of the Insurance Code as to particular licenses, the superintendent may suspend, revoke or refuse to continue any license issued under this article for any of the following reasons applicable as to licensee:

(1) for any cause for which issuance of the license could have been refused had it then existed and been known to the superintendent;

(2) violation of any provision of the Insurance Code or other law applicable to the business transacted under the license;

(3) wilful failure to comply with, or wilful violation of, any lawful

order, rule or regulation of the superintendent;

(7) fraudulent or dishonest practices in conduct of business under the license; etc.

59A-11-15. Procedure for suspension, revocation or refusal to continue license.

A. Not less than twenty (20) days prior to the effective date of any suspension, revocation or refusal to continue any license issued under this article, the superintendent shall mail his order and notice thereof to the licensee at the licensee's last address of record in the insurance department. Unless prior to such effective date the licensee requests a hearing thereon, under applicable procedures provided in Article 4 (examination, hearings, and appeals) of the Insurance Code, the order shall be final and not subject to review or appeal.

59A-11-19. Return of license to superintendent.

A. All licenses issued under this article are, and shall continue to be, the property of the state of New Mexico. Upon suspension, revocation, refusal to continue or other termination of

the license, the licensee, former licensee, holder or possessor thereof shall forthwith deliver the license to the superintendent.

59A-12-2. "Agent," "nonresident agent" defined.

A. For the purpose of this article an "agent" is a person appointed by an insurer authorized to transact insurance in this state, to solicit applications for insurance or annuity contracts on its behalf, to countersign insurance policies or contracts if expressly so authorized by the insurer, and to perform such other services relative to such transactions as the insurer may authorize.

59A-12-6. License required; penalty.

A. No person shall in this state be, act as or hold himself out to be, as to subjects of insurance resident, located or to be performed in this state or elsewhere, an agent or solicitor unless then licensed as such under the Insurance Code.

RULES GOVERNING THE PRACTICE OF LAW, NMSA, Jud. Vol. 2.

16-303. Candor toward the tribunal.

A. **Duties.** A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity; the lawyer shall take reasonable remedial measures.

RULES OF PROFESSIONAL CONDUCT

16-804. Misconduct.

It is professional misconduct for a lawyer to:

A. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do

so, or do so through the acts of another.

C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

D. engage in conduct that is prejudicial to the administration of justice;

G. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

H. engage in any conduct that adversely reflects on his fitness to practice law.

Q. What do you mean the meaning of life is as used there? When State Farm says you're a life member?

A. Well, that means that he is in the club from then on.

Q. Do you think that's inconsistent with termination?

A. No. I have had to terminate several life members and regret it very much.

Q. Would have to be for serious charge?

A. Yes.

Q. And you would agree that if life-time -- if he is in the club -couldn't go around and say now we have changed our mind and putting you out for no reason?

A. That's right.

NEW MEXICO CONSTITUTION

ARTICLE III

Distribution of Powers

Section 1. [Separation of departments; establishment of workmen's compensation body.] The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. . . . New Mexico Statutes, 1978, Annotated, Pamphlet 2, 1987 Cumulative Supp.